IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

DAVID LOVELL PLAINTIFF

VS. CIVIL ACTION NO. 2:99CV74-SAA

JOHN PICKETT, III INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF OF TUNICA COUNTY, MISSISSIPPI; JOHN DOES ONE, TWO, THREE, FOUR, AND FIVE INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS JAILORS AND/OR DEPUTY SHERIFFS OF TUNICA COUNTY, MISSISSIPPI AND TUNICA COUNTY, MISSISSIPPI DEFENDANTS

**MEMORANDUM OPINION**

This matter is before the court on motion of the defendants for summary judgment. In accordance with the provisions of 28 U.S.C. § 636(c), the parties consented to have a United States Magistrate Judge conduct all proceedings in this case, including an order for entry of final judgment on any or all of the plaintiff's claims. After review of the pleadings and briefs of the parties, the court finds as follows:

## I. FACTS AND PROCEDURAL HISTORY

The facts of this case have been set out in this court's Memorandum Opinion of June 27, 2000, and need not be reiterated here. The plaintiff filed the present action alleging that the defendants were liable for injuries he suffered following his arrest in January 1998. According to the plaintiff, the defendants violated his constitutional rights based on a number of events, including knocking a hat from his head and beating him once he arrived at the Tunica County jail. The defendants filed the present motion for summary judgment, arguing that the plaintiff has

produced no evidence whatsoever to support any claims against Tunica County or the defendants in their official or individual capacities. In his response to the present motion, the plaintiff concedes that he has discovered no evidence to establish a claim against either Tunica County or the remaining defendants in their official capacities, and thus the defendants' motion for summary judgment shall be granted as to those defendants.[1] Therefore, the only remaining claims in this action are against Hayes, Williams, Hamp, and Doe in their individual capacities. These remaining defendants argue that they too are entitled to summary judgment. In support of their contention, the defendants argue that the plaintiff has failed to describe a single incident in which any of the defendants were involved. Consequently, the defendants argue that qualified immunity shields them from liability. The plaintiff responds, pointing almost exclusively to the language of the complaint.

## II. DISCUSSION

### A. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). "The moving party must show that if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the nonmoving party to carry its burden." *Beck v. Texas State Bd. of Dental Examiners*, 204 F.3d 629, 633 (5th Cir. 2000) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *cert. denied*, 484

[1]Of course, the claims against the individuals in their official capacities are treated as claims against the entity itself. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Brooks v. George County*, 84 F.3d 157, 165 (5th Cir. 1996).

U.S. 1066 (1988)). After a proper motion for summary judgment is made, the burden shifts to the non-movant to set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby,* Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986); *Beck*, 204 F.3d at 633; *Allen v. Rapides Parish School Bd.,* 204 F.3d 619, 621 (5th Cir. 2000); *Ragas v. Tennessee Gas Pipeline Company*, 136 F.3d 455, 458 (5th Cir. 1998). Substantive law determines what is material. *Anderson*, 477 U.S. at 249. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*, at 248. If the non-movant sets forth specific facts in support of allegations essential to his claim, a genuine issue is presented. *Celotex*, 477 U.S. at 327. "Where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538 (1986); *Federal Savings and Loan, Inc. v. Krajl*, 968 F.2d 500, 503 (5th Cir. 1992). The facts are reviewed drawing all reasonable inferences in favor of the non-moving party. *Allen*, 204 F.3d at 621; *PYCA Industries, Inc. v. Harrison County Waste Water Management Dist.*, 177 F.3d 351, 161 (5th Cir. 1999); *Banc One Capital Partners Corp. v. Kneipper*, 67 F.3d 1187, 1198 (5th Cir. 1995). However, this is so only when there is "an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994); *see Edwards v. Your Credit, Inc.*, 148 F.3d 427, 432 (5th Cir. 1998). In the absence of proof, the court does not "assume that the nonmoving party could or would prove the necessary facts." *Little*, 37 F.3d at 1075 (emphasis omitted).

## B. EDDIE HAYES and MAURICE WILLIAMS

As discussed *supra*, the only remaining claims are those against Hayes, Williams, Hamp, and Doe in their individual capacities. Hayes and Williams are both deputies with the Tunica County Sheriff's office, and both claim they are shielded from liability pursuant to the doctrine of qualified immunity. The court, however, does not reach that issue. Summary judgment shall be granted in favor of Hayes and Williams simply because the plaintiff has provided no evidence at all that Hayes and Williams were involved at any time in the incidents in question. The only mention the court has found of Hayes and Williams appears in the plaintiff's amended complaint and the only mention there is to describe them as deputy sheriffs in Tunica County. In his response to the present motion, the plaintiff focuses heavily on the law surrounding qualified immunity. The plaintiff also quotes twice from his amended complaint where he describes the actions of "officers" or "deputies." Even if the court were to assume that these "officers" or "deputies" were Hayes and Williams, the bald allegations made in the complaint are not sufficient to defeat summary judgment. *See, e.g., Ross v. Communications Satellite Corp.,* 759 F.2d 355, 364 (4th Cir. 1985) (noting that "the nonmoving party must produce 'specific facts showing that there is a genuine issue for trial,' rather than resting upon the bald assertions of his pleadings"). Rule 56 provides in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Fed. R. Civ. P. 56(e). Other than a copy of the amended complaint the only evidence provided by

the plaintiff in response to the motion for summary judgment is a copy of the plaintiff's deposition transcript. In that deposition, the plaintiff never once describes any action taken by Hayes or Williams. The plaintiff does allege that "deputies" or "officers" or "jailers" committed acts that may have violated his constitutional rights, but when asked to identify these alleged offenders, the plaintiff could not do so. Because the plaintiff has failed to provide any evidence whatsoever to support any allegations against the defendants Eddie Hayes and Maurice Williams, summary judgment shall be granted in favor of both defendants.

**C. CALVIN K. HAMP**

As with Hayes and Williams, the plaintiff does not mention Hamp by name in the amended complaint except to describe him as a deputy sheriff in Tunica County. However, the plaintiff does mention Hamp by name in his deposition. According to the plaintiff, it was Hamp who initially arrested him in the parking lot of Fitzgerald's Casino. The plaintiff claims that while making the arrest, Hamp slapped the plaintiff's hat off with his hand. The hat depicted a rebel flag which the plaintiff claims he wore out of loyalty to Ole Miss. The plaintiff also claims that Hamp was present at the Tunica County jail when the plaintiff was allegedly beaten. Hamp claims that summary judgment is appropriate, relying on the doctrine of qualified immunity.

A defendant acting in his individual capacity may invoke the doctrine of qualified immunity to shield himself from liability. *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980). Often referred to as the qualified immunity defense, the doctrine of qualified immunity is not a defense at all, but is essentially a right not to be sued under certain circumstances. *Thornhill v. Breazeale*, 88 F. Supp. 2d 647, 653 (S.D. Miss. 2000). The doctrine of qualified immunity does not insulate from liability a governmental entity or a person acting in his official capacity. *Owen*, 445 U.S. at

622. It can only protect a person acting under color of law in his individual capacity. In the present case, the plaintiff named Officer Hamp in his individual capacity.

To determine whether a defendant is entitled to qualified immunity, the court performs a following two-part test, determining (1) whether the plaintiff has alleged a violation of a clearly established constitutional right, and (2) if so, whether the defendant's conduct was objectively reasonable in light of the clearly established law at the time of the incident. *Hare v. City of Corinth*, 135 F.3d 320, 325 (5th Cir. 1998). In the present action, the plaintiff alleges several violations of his constitutional rights. However, because the plaintiff has provided evidence to support only one of these claims, summary judgment shall be granted as to the rest.

As mentioned, the plaintiff does not specifically describe any actions taken by Hamp in his amended complaint. He does, however, discuss Hamp in his deposition. First, the plaintiff describes the arrest. According to the plaintiff, it was Hamp who arrested him and slapped the hat from the plaintiff's head. In the plaintiff's deposition, the following exchange is all that appears to describe the incident surrounding the hat:

> Q. So you were sitting down in the police car and [Officer Hamp] asked you about your hat.
>
> A. Yes, sir.
>
> Q. What did he ask you?
>
> A. He asked me what I had the hat on for and I told him it was an Ole Miss hat and then he reached over and slapped it off my head.
>
> Q. Okay. What happened then?
>
> A. I told him he didn't have no right to be slapping on me and that's when another, I believe another cop showed up then and he had been up there talking to the other guys I believe.

It is unclear from the plaintiff's amended complaint, but the court assumes the plaintiff construes the above described actions as constituting excessive force.

A constitutional guarantee exists under the Fourth Amendment against unreasonable seizure through the use of excessive force by a law enforcement officer in the course of making an arrest. *Harper v. Harris Co.*, 21 F.3d 597, 600 (5th Cir. 1994). However, the plaintiff's claim fails when the court looks to the second part of the two-part test set out in *Hare*. As mentioned, the plaintiff's claim for excessive force must be determined according to Fourth Amendment standards because "all claims that law enforcement officers have used excessive force in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham v. Connor*, 490 U.S. 386, 395 (1985). The issue of reasonableness centers on whether the officer's actions are "objectively reasonable" in light of the facts and circumstances with which he is faced, without regard to the officer's underlying intent or motivation. *Id.* at 397. Whether the use of force is reasonable "must be judged from the perspective of a reasonable officer on the scent, rather than with the 20/20 vision of hindsight." *Id.* at 396. In applying *Graham*, the Fifth Circuit has used a three-part test for § 1983 excessive force claims, requiring a plaintiff to show (1) an injury, which (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was (3) objectively unreasonable. *Knight v. Caldwell*, 970 F.2d 1430, 1432-33 (5th Cir. 1992). In the present case, the plaintiff provides no evidence to show that any injury however minor resulted when Officer Hamp slapped his hat from his head. The plaintiff does provide photographs and testimony concerning injuries suffered on the night in question, but the injuries depicted are those

allegedly received after he arrived at the Tunica County Jail. As a result, the court finds that summary judgment is appropriate with regard to the plaintiff's claim for excessive force.

Later in his deposition, the plaintiff again mentions Officer Hamp. This time, the plaintiff claims that Hamp was in a room in the Tunica County Jail along with four unnamed officers who allegedly beat the plaintiff without justification. When questioned regarding the officers in the room at that time, the following exchange took place:

> Q. Other than Officer Hamp do I understand then that you cannot identify any of the four officers who were in that room with you?
>
> A. I believe one of them was the second officer that pulled up at the time. I'm pretty sure he was one of them.[2]

The plaintiff contends that the actions that occurred in the room violated his constitutional rights. The plaintiff did not, however, provide any evidence to show that Hamp actually touched him. Indeed, the plaintiff states in his deposition that other than Hamp, he cannot name any of the others in the room that night. Additionally, the plaintiff states that he cannot say who hit him once he was thrown to the floor by an unknown officer. As a result, the court can only construe this claim against Officer Hamp as one involving a failure to protect.

As with his claim for excessive force, the plaintiff passes the first part of the two-part test set out in *Hare*. With this claim, the plaintiff has certainly alleged a violation of a clearly established constitutional right. The plaintiff claims that Officer Hamp failed to protect him in violation of his rights provided by the Fourteenth Amendment. Discussing this issue in *Hare*, the Fifth Circuit wrote:

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[2]Officer Dunn was the "second officer that pulled up." Inexplicably, Dunn was not named as a defendant.

> We hold that the episodic act or omission of a state jail official does not violate a pretrial detainee's constitutional right to be secure in his basic human needs, such as medical care and safety, unless the detainee demonstrates that the official acted or failed to act with deliberate indifference to the detainee's needs.

*Hare*, 74 F.3d at 647, 48. In his deposition, the plaintiff states that Officer Hamp was in the room when he was thrown to the ground and beaten. Accordingly, the plaintiff has alleged a violation of a clearly established constitutional right.[3]

Next, the court looks to determine whether the conduct of Officer Hamp was objectively reasonable in the light of the then clearly established law. *See, e.g.*, *Rankin v. Klevenhagen*, 5 F.3d 103, 108 (5th Cir. 1993). This issue does not require in depth discussion. Clearly, a police officer standing by while other officers beat a handcuffed plaintiff is unreasonable. This is not to say that this occurred, but at present, the court views the evidence in the light most favorable to the non-movant. Accordingly, the court finds that the defendant Hamp's motion for summary judgment shall be denied as it pertains to the plaintiff's failure to protect claim.

## D. STATE LAW CLAIMS

Because all claims except the failure to protect claim against Officer Hamp have been dismissed, all conspiracy claims (Count VII in the amended complaint) will likewise be dismissed. Similarly, Counts XI and XII will be dismissed because all claims against Sheriff Pickett have been either dismissed or conceded by the plaintiff. In count IX, the plaintiff alleges assault and battery. Assault occurs where a person "(a) acts intending to cause a harmful or offensive contact with the

[3]The standard in *Hare* was set out in the Fifth Circuit's opinion in January 1996. The incidents out of which the present case arose occurred in January 1998. It is, therefore, clear that the parameters of the law were clearly defined by the time of the plaintiff's arrest. This issue has not been disputed.

person of the other or a third person, or an imminent apprehension of such a contact, and (b) the other is thereby put in such imminent apprehension." Restatement (Second) of Torts § 21 (1965). A battery goes one step beyond an assault in that a harmful contact actually occurs. *See Webb v. Jackson*, 583 So. 2d 946, 951 (Miss. 1991); Restatement (Second) of Torts § 13 (1965). In the present case, the court finds that the plaintiff has provided sufficient evidence to withstand summary judgment as it pertains to his assault and battery allegations against Officer Hamp that Hamp knocked the plaintiff's hat from his head. This is the only instance in which the plaintiff has provided proof enough to sustain a claim of assault and battery in the present case. Finally in Count X, the plaintiff alleges intentional infliction of emotional distress. In order to prevail on this claim, the plaintiff will have to show that Officer Hamp's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Pegues v. Emerson Elec. Co.*, 913 F. Supp. 976, 982 (N.D. Miss. 1996). The court finds that the plaintiff has provided sufficient evidence to withstand summary judgment as it pertains to his intentional infliction of emotional distress allegations against Officer Hamp when Hamp allegedly failed to protect the plaintiff at the Tunica County jail. This is the only instance in which the plaintiff has provided proof enough to sustain a claim of intentional infliction of emotional distress in the present case.

**D. JOHN DOE**

The plaintiff named as a defendant "John Doe, Individually and in his Official Capacity as Deputy Sheriff and/or Jailor of Tunica County Jail." The plaintiff named John Does 1-5 in his original complaint filed on April 8, 1999 and only John Doe in his amended complaint filed on February 14, 2000. Since April 8, 1999, the plaintiff has failed to identify John Doe. The

deadline for amending the pleadings passed on September 1, 2000. The trial in the present action is set for June 4, 2001. Discovery and the motion filing deadline have both passed. Thus, it is clear that the plaintiff has been unable to identify John Doe, and thus, his name will be dismissed from the present action.

An order in accordance with this opinion shall issue this day.

This the_____ day of March 2001.

_____/s/_____
UNITED STATES MAGISTRATE JUDGE